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No. _____

In the Supreme Court of the United States

October Term, 1987

NATIONAL COUNCIL ON COMPENSATION INSURANCE,
Petitioner,

v.

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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December 21, 1987 **Counsel of Record*

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QUESTIONS PRESENTED

The Court of Appeals for the Sixth Circuit found the Department of Labor regulation, 20 C.F.R. § 727.203, invalid as contrary to the "not more restrictive" language of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2). It then took the additional step of substituting the Health, Education and Welfare regulation, 20 C.F.R. § 410.490, to adjudicate black lung claims under Department of Labor jurisdiction.

The following questions are thus presented:

1. Does the DOL regulation at 20 C.F.R. § 727.203 comply with the statutory mandate of 30 U.S.C. § 902(f)(2) requiring Labor's regulations not be more restrictive than former criteria of the HEW.

2. Is the lower court empowered to substitute HEW regulations for those of the DOL and force DOL to adjudicate Part C claims under HEW standards, without violating the rule-making provisions of the Administrative Procedure Act?

3. Whether application of HEW regulations to Part C claims provides Operators and their insurance carriers a full and fair hearing consistent with the Fifth Amendment to the United States Constitution and the Administrative Procedure Act.

4. Whether the HEW regulation is invalid as creating presumptions of disability and causation inconsistent with the requirements of the Black Lung Benefits Act, 30 U.S.C. §§ 921(c)(1) and 932(c).

PARTIES TO THE PROCEEDING

This action originated with a claim for black lung benefits by Fred Kyle, alleging total disability from coal workers' pneumoconiosis as a result of 8½ years of coal mine employment. His former employers were not named in the suit because Mr. Kyle's last coal mine employment ended in 1951 and the statute prohibited Operator liability for pre-1970 employment. 30 U.S.C. § 932(j)(2). Instead, the Director, Office of Workers' Compensation Programs was named as a party-in-interest, representing the Black Lung Disability Trust Fund which became liable for benefits in the absence of a responsible Operator. 26 U.S.C. § 9501(d)(1)(B). The Director is also the administrator of the Federal Black Lung Program.

The National Council on Compensation Insurance ("NCCI") intervened at the Court of Appeals for the Sixth Circuit. The NCCI is a nonprofit, voluntary association of insurance companies, insuring and reinsuring workmen's compensation policies. A significant portion of this insurance and reinsurance business involves coverage of coal mine operators under Part C of the Black Lung Benefits Act. NCCI also administers the National Workers Compensation Reinsurance Pool which reinsures policies under the Act and provides direct coverage to coal operators unable to secure insurance in the open market. In addition, NCCI prepares rating plans for compensation insurance in thirty-five states. Once effective, these rating plans help determine the cost of compensation insurance. The NCCI also has a wholly owned subsidiary known as Insurance Technical and Archiaval Consultants Corporation.

NCCI intervened in the court below, seeking to protect the interests of its member companies compelled, under *Kyle's* mandate, to adjudicate Part C cases under

Part B rules. (App., at 13a). By substituting § 410.490 for § 727 for Part C claims, including Operator-defended claims, *Kyle* imposed a new regulatory scheme upon Operators and their insurance carriers.

NCCI is the Petitioner herein and all other parties below are Respondents.

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DEPARTMENT OF LABOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, National Council on Compensation Insurance, respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 819 F.2d 139. (App., at la). The Order of the Court of Appeals granting intervenor's motion to intervene is unreported. (App., at 12a). The Order denying intervenor's Petition for

Rehearing and Suggestion for Rehearing En Banc is unreported. (App., at 11a).

JURISDICTION

The decision of the Court of Appeals was filed on May 18, 1987. Separate Petitions for Rehearing were filed by the government and by the intervenors. Both petitions were denied by an Order dated September 22, 1987. (App., at 11a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The due process provisions of the Fifth Amendment to the Constitution of the United States. (App., at 30a).

2. The equal protection component of the Fifth Amendment to the Constitution of the United States. (App., at 30a).

3. The Administrative Procedure Act, 5 U.S.C. § 553 (pertaining to notice and comment). (App., at 30a).

4. The Administrative Procedure Act, 5 U.S.C. § 556(d) (pertaining to full and fair hearings). (App., at 32a).

5. The Black Lung Benefits Act, § 402(f)(2), 30 U.S.C. § 902(f)(2). (App., at 33a).

6. The regulations of Health, Education & Welfare, 20 C.F.R. § 410.490. (App., at 34a).

7. The regulations of Department of Labor, 20 C.F.R. § 727.203. (App., at 37a).

STATEMENT OF THE CASE

A. Statutory Background

The Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1986) (the "Act") is a comprehensive statute, providing monetary compensation to coal miners totally disabled from coal workers' pneumoconiosis[1] as a result of their employment. 30 U.S.C. § 901(a). The Act classifies claims according to their date of filing, creating two parts of the statute known simply as Parts B and C. Part B represented the initial phase of the statute wherein the federal government assumed liability for successful miners who filed claims before June 30, 1973.[2] This initial phase of the program was administered by the Department of Health, Education & Welfare ("HEW"). 30 U.S.C. § 921. Whereas, Part C represented the larger, permanent phase of the program governing claims filed after December 31, 1973.[3] Successful Part C claimants received benefits from their coal mine employers and their insurers rather than from the

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[1]In a purely medical sense, "pneumoconiosis" is a reaction of the lungs to inhaled mineral or organic dusts. W.R. PARKS, OCCUPATIONAL LUNG DISORDERS, 2 (2nd ed. 1982). Coal mine dust is one of the organic dusts that may produce a pneumoconiosis, which is then referred to as "coal workers' pneumoconiosis." Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W.Va.L.Rev. 721, 728-729 (1981). Whereas, the statutory definition of pneumoconiosis is more narrow than the medical definition, referring only to coal workers' pneumoconiosis. 30 U.S.C. § 902(b).

[2]30 U.S.C. § 921-925.

[3]30 U.S.C. § 931-945. Due to the sequence of amendment, a gap appears between the end of Part B and the beginning of Part C. Claims filed during this period are known as "transition period" claims because they were filed during the transition from Part B to Part C. 30 U.S.C. § 925. Transition period claims were administered by the DOL but paid by the government for any month prior to January 1, 1974. *Id.*

federal government.[4] Adjudication of Part C claims would thus involve notice to potentially liable coal mine operators ("Operators") and a corresponding opportunity to defend that liability. As Part C came into effect, administrative responsibility shifted from the HEW to the Department of Labor ("DOL"). The DOL would administer Part C claims while HEW retained responsibility for administration of Part B claims. Notwithstanding this division of administrative responsibility, only the HEW was given authority to draft regulations governing entitlement.[5] These regulations were first promulgated on April 7, 1970, 35 Fed. Reg. 5623, and later became known as "Subpart D" standards. 20 C.F.R. § 410.401.

The Act was first amended in 1972[6] expanding the definition of total disability and bringing surface miners within the Act. The legislative hearings preceding the 1972 amendments revealed a Congress critical of the Subpart D regulations and the backlog of claims they created, prompting HEW to promulgate "interim" standards. 20 C.F.R. § 410.490. These interim standards, adopted on September 30, 1972, reduced the backlog of claims by liberalizing the claimant's medical burden for establishing disability and by creating generous presumptions of disability once medical evidence was offered.[7] These interim

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[4]30 U.S.C. § 932. Insurance coverage is mandatory under the Act, either by qualifying as self-insurer or purchasing proper workmen's compensation coverage. 30 U.S.C. § 933.

[5]Federal Coal Mine Health And Safety Act of 1969, Pub.L.No. 91-173, Title IV, § 411(b), 83 Stat. 742 (1969)

[6]Black Lung Benefits Act of 1972, Pub.L.No. 92-303, 86 Stat. 150 (1972).

[7]For example, standards for disability as measured by ventilatory studies were reduced. *Compare* 20 C.F.R. § 410.426(b) with 20 C.F.R.

(Continued on next page)

standards, however, had no practical effect on Part C claims administered by the DOL for the regulation was strictly limited to Part B claims under HEW jurisdiction.[8] Without authority to apply § 410.490 and lacking its own rule-making power, the DOL was left to apply the pre-1972 regulations to Part C claims while the HEW applied the more liberal § 410.490 to Part B claims.

Congress amended the Act again in 1977,[9] broadening coverage of the Act by expanding the definition of "miner" and by enlarging the definition of "pneumoconiosis" to include virtually any respiratory impairment which might arise out of coal related employment. Congress decided that all claims pending or denied under the pre-1977 standards deserved reconsideration under the newer and more liberal amendments. Claimants in this category could elect to have their "pending or denied" claims revived and reviewed under the new statutory and regulatory standards. 30 U.S.C. § 945. Finally, the 1977 amendments conferred rule-making authority upon the DOL with respect to Part C claims.[10] However, the new DOL regulations for these "review" claims could not be more restrictive than criteria applicable on June 30, 1973 (e.g., § 410.490). *See*, 30 U.S.C. § 902(f)(2). The DOL adopted its own interim regulations on August 18, 1978. 20 C.F.R. § 727.203.

(Continued)

§ 410.490(b)(l)(ii). A claimant could produce much higher values on ventilatory studies under § 410.490 and still be found disabled.

[8]Section 410.490 was interpreted as applying only to Part B claims. *Young v. Harper Valley Coal Corp.*, 2 B.L.R. 1-167, 174 (1979).

[9]Black Lung Benefits Reform Act of 1977, Pub.L.No. 95-239, 92 Stat. 95 (1978).

[10]*Id.* at § 402(f)(1)

Like its HEW predecessor, the DOL regulations contained presumptions of disability for claimants with positive X-rays or lowered ventilatory study values. 20 C.F.R. § 727.203(a). Unlike its predecessor, § 727 would allow invocation of the presumption by arterial blood gas studies and medical opinions of disability. 20 C.F.R. § 727.203(a)(3)&(4). However, the DOL regulation imposed a ten year employment threshold as a prerequisite to the availability of the presumption of disability. 20 C.F.R. § 727.203(a). The HEW and DOL regulations also set different rebuttal standards. Section 410.490 allowed rebuttal of the "presumed" disability only where: (a) the claimant was actually working; or (b) the claimant was physically able to work. 20 C.F.R. § 410.490(c). Whereas, § 727 permitted the above rebuttal *plus* two additional methods. These were proof that the miner did not have pneumoconiosis, or that his disability was unrelated to coal mining. 20 C.F.R. § 727.203(b)(3) & (4).

Congress amended the Act again in 1981.[11] Unlike prior changes, these amendments restricted eligibility under the Act by repealing three of the five presumptions based upon a miner's length of coal mine employment.[12] These presumptions were repealed prospectively, meaning they would not be available for claims filed after the effective date of the 1981 amendments. Just prior to tnese

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[11]Black Lung Benefits Revenue Act of 1981, Pub.L.No. 97-119, 95 Stat. 1635 (1981)

[12]These five presumptions are set forth at 30 U.S.C. § 921(c). The only presumptions which remain in effect after 1981 related to (1) a presumption of casual relationship of disease to employment where the miner has 10 or more years of employment; and (2) an irrebuttable presumption of total disability where the miner has "complicated" pneumoconiosis. *Id.*

amendments, the DOL promulgated a final series of regulations to serve as permanent standards. These permanent standards governed all claims filed after March 31, 1980. 20 C.F.R. § 718.

The administration of the Act is thus divided between two agencies, each with distinct regulations and separate categories of claims and parties. Despite continuing legislative tinkering, the original distinction between Part B and C claims remains a permanent fixture of the statute.

B. Factual Background

Fred Kyle sought federal black lung benefits by application of February 15, 1980, meaning that his was a Part C claim normally governed by § 727 regulations of the DOL. He was ineligible for the HEW regulation at § 410.490 because his claim was not filed on or before June 30, 1973 and, accordingly, was not a Part B filing.

The DOL evaluated Mr. Kyle's application under § 727, and denied his claim. Formal hearing was held on May 25, 1982 before an Administrative Law Judge resulting in a second rejection of the claim. (App., at 24a). Although he had evidence of pneumoconiosis, Mr. Kyle had only 8½ years of coal mine employment and could not meet the ten year employment threshold of § 727.203(a). He appealed to the Benefits Review Board, which affirmed the denial of benefits in an unpublished opinion. (App., at 19a).

The Court of Appeals for the Sixth Circuit reversed and remanded, accepting Mr. Kyle's argument that Part B rules of § 410.490 applied to his Part C claim. (App., at 10a). The Court interpreted the "not more restrictive" language of 30 U.S.C. § 902(f)(2) as mandating the use of § 410.490, believing that DOL regulations at § 727 were

"more restrictive" than § 410.490 for miners with less than 10 years of coal mine employment. In the Court's view, Mr. Kyle would be entitled to the presumption under § 410.490 based on the evidence of record. (App., at 4a). Whereas, that same evidence could not entitle the claimant to the § 727 presumption of disability because of the ten year requirement. Thus, the ten year threshold of § 727.203(a) violated the "not more restrictive" statutory standard.

Rather than remove the "unacceptable" regulatory language, the Court of Appeals substituted the Part B regulation for the DOL regulatory scheme. As a result, § 410.490 has been wrenched from Part B and forcibly applied to Part C of the statute, including Operator-defended claims. Thus, *Kyle* imposes a new regulatory scheme upon Operators and their insurance carriers.

REASONS FOR GRANTING THE WRIT

The expansion of § 410.490 to Part C has become a fashionable issue in the lower courts around the nation. Unfortunately, engrafting a regulatory scheme of governmental liability onto a statutory scheme of Operator liability is fraught with difficulty. The resultant problems are manifested by petitions for certiorari generated virtually every time a court of appeals has restyled the regulatory framework. *Petition for Writ of Certiorari, Pittston Coal Group v. Sebben,* No. 87-821 (Sup.Ct., filed November 20, 1987); *Petition for Writ of Certiorari, Whitfield v. Sebben,* No. 87-827 (Sup.Ct., filed November 20, 1987). *See also, Application for Extension of Time to file Petition for Writ of Certiorari, Whitfield v. Kyle,* No. A-458, (Sup.Ct., filed December 9, 1987). The primary issue in all of these cases is whether § 727 conforms to the statutory mandate of 30

U.S.C. § 902(f)(2). The secondary issue is whether § 410.490 can be substituted for § 727 by the Court of Appeals to govern Part C claims adjudication. The parties in *Sebben* preserved some of these issues, but only *Kyle* embraces all of them. As the Solicitor General observed in his *Sebben* petition, review in that case is warranted only if § 727 violates the statutory mandate. *Petition for Writ of Certiorari, Whitfield v. Sebben, at 6,* No. 87-827 (Sup.Ct., filed November 20, 1987). The Solicitor General is correct for the cumbersome mandamus issues in *Sebben* are likely to obfuscate the real question concerning the regulations. The application of § 410.490 to Part C is a significant issue affecting the coal mining and insurance industries, which are liable for the greatest bulk of Part C cases. Those industries should, therefore, have a voice in the outcome of this important issue. As *Kyle* involves such an industry presence, its review will present the most practical and efficient challenge to the errant use of § 410.490.

1. Conflict Among the Circuits

Kyle found § 727 invalid as the regulation was "more restrictive" than HEW criteria contrary to the statutory command at 30 U.S.C. § 902(f)(2). In the process, the Sixth Circuit rejected DOL's argument that the restrictive language in the statute applied to medical, but not evidentiary standards. (App., at 7a). Rather than eliminate the offending regulatory language, *Kyle* directed that § 410.490 determine the eligibility of the Part C claim at issue. (App., at 10a). Faced with the same argument, the Seventh Circuit reached a contrary result in *Strike v. Director, Office of Worker's Comp. Programs,* 817 F.2d 395 (7th Cir., 1987). The *Strike* court concluded that the DOL regulations complied with the Act as the "not more restrictive" language applied to medical rather than evidentiary criteria. *Id.* at

404-05. The Seventh Circuit has thus upheld the DOL regulation on precisely the same ground that prompted the Sixth Circuit to find it invalid.

Conversely, the Third Circuit decided that neither § 410.490 nor § 727 would apply to Part C claimants with less than 10 years of coal mine employment. Instead, the Third Circuit applied the permanent § 718 regulations even though they had not been promulgated when the claim was filed. *Caprini v. Director, Office of Worker's Comp. Programs,* 824 F.2d 283, 284 (3d Cir., 1987). The Third, Sixth and Seventh Circuit decisions are hopelessly irreconcilable as each would apply a different regulatory standard to the same claim.

Disharmony abounds even where the circuits purportedly agree to apply § 410.490 to Part C claims. Consider, for example, the selective and arbitrary manner of its application. The Third Circuit[13] originally applied § 410.490 to a limited number of claims, corresponding only to those "reviewed" under 30 U.S.C. § 945. *Halon v. Director, Office of Worker's Comp. Programs,* 713 F.2d 21, 25 (3d Cir., 1983) (read § 902(f)(2) and § 945 together). Claims reviewed under § 945 were those filed *before* March 1, 1978 which sought or elected reconsideration under the 1977 amendments. Conversely, the Fourth Circuit has prospectively applied § 410.490 to any claim, currently pending, that had been filed before March 31, 1980. *Broyles v. Director, Office of Worker's Comp. Programs,* 824 F.2d 327, 329 (4th Cir., 1987). There is obviously a two year discrepancy (1978-1980) between the use of § 410.490 in the Third Circuit when compared to the Fourth Circuit.

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[13]The Third Circuit in *Halon* is generally cited as the seminal case applying § 410.490. In light of the more recent opinion in *Caprini, supra.*, it is unclear what direction the Third Circuit will follow.

This discrepancy is slight, however, when compared to the grandiose plan of the Eighth Circuit, resurrecting any claim with less than 10 years of coal mine employment that had been filed between December 31, 1969 and March 31, 1980 for re-adjudication under § 410.490. *In re Sebben,* 815 F.2d 475, 484-85 (8th Cir., 1987), *cert. filed,* (Nos. 87-821 & 87-827, filed November 20, 1987). Among the various circuits joining the § 410.490 bandwagon, there is a clear difference of opinion on what Part C claims may be benefited.

Rebuttal serves as another point of departure for the lower courts. The Third Circuit is uncertain which regulation will govern rebuttal. *Sulyma v. Director, Office of Worker's Comp. Programs,* 827 F.2d 922 (3d Cir., 1987) (rebuttal under § 410.490); *but see, Caprini v. Director, Office of Worker's Comp. Programs,* 824 F.2d 283 (3d Cir., 1987) (invocation and rebuttal governed by § 718). Whereas, the Eighth Circuit necessarily applies § 410.490 to rebuttal of the presumption. *In re: Sebben, supra.,* at 481 (§ 727 overturned leaving only § 410.490). The Sixth Circuit takes a different approach, using § 727 to determine rebuttal standards, but § 410.490 to determine invocation of the presumption. *Prater v. Hite Preparation Co.,* 829 F.2d 1363, 1366n.2 (6th Cir., 1987). Hence, the Sixth Circuit stands alone in simultaneously applying selected portions of § 410.490 and § 727 to the same claim.

This inscrutable array of cases produces an intolerable environment for credible, uniform administration of nationwide legislation. It befuddles insurance companies who cannot determine which of three regulations will govern claims, particularly when the third, fourth and sixth circuits involve states with contiguous borders and heavy

concentrations of coal mining industries.[14] The hodgepodge of regulatory standards applied throughout these circuits suggests that final outcome of litigation is dependent upon the circuit in which the case is tried. This ambiguity and contrariety has intensified with each new decision, leaving no hope these conflicts will evaporate absent review by this Court.

2. Conflict Between Court of Appeals and Supreme Court

This Court's most recent analysis of the black lung benefits program occurred in *Mullins Coal Co. of Virginia v. Director, Office of Workers' Comp. Programs*, No. 86-327 (Sup.Ct., filed December 14, 1987). While not directly confronted with the argument that § 727 violated its statutory mandate, the majority carefully observed that the DOL regulation "satisfied Congress' demand that Labor's criteria shall not be more restrictive" than HEW's. *Id.* Certainly, *Kyle's* holding is directly at odds with the majority's view of the statute.

Kyle was rendered by an appellate court reviewing the propriety of DOL rule-making pursuant to 30 U.S.C. § 923(a).[15] Admittedly, the court was authorized to determine the validity of the agency rule. However, authority to review agency rule-making does not also empower the court to fashion a replacement for the offending regulation. *Vermont Yankee Nuclear Power Corp. v. Natural*

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[14]These contiguous states are Pennsylvania, West Virginia and Ohio referring to the Third, Fourth and Sixth Circuits, respectively. 28 U.S.C. § 41.

[15]More specifically, appellate review was pursuant to provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c). These provisions were incorporated into the Black Lung Benefits Act by 30 U.S.C. § 923(a). *Accord, Butcher v. Big Mountain Coal, Inc.*, 802 F.2d 1506, 1507 (4th Cir., 1986).

Resources Defense Council, 435 U.S. 519, 525 (1978); *F.C.C. v. Schreiber,* 381 U.S. 279, 290-91 (1965). The Sixth Circuit crossed this barrier when, after invalidating the 10 year requirement of § 727, it directed the agency to replace the *entire regulation* with § 410.490. (App., at 10a). The lower court improperly engrafted its notion of a "proper rule" upon the DOL contrary to the clear proscriptions of this Court.

Such judicial rule-making also violates the "notice and comment" provisions of the Administrative Procedure Act, 5 U.S.C. § 533 (1986) ("APA"), as the use of the rule in Part C cases exceeds the published notice that accompanied the rule. This Court overturned similar judicial forays into rule-making procedures as failing to comply with the APA. *Heckler v. Lopez,* 463 U.S. 1328, 1333-34 (1983); *N.L.R.B. v. Wyman-Gordon Co.,* 394 U.S. 759, 764-65 (1969).[16]

3. Section 410.490 is a Defective Regulation

Another factor militating in favor of certiorari is the confiscatory nature of § 410.490. The total absence of any reasonable defense to the presumption may not have disturbed the regulator-government, but it does offend an industry now to be regulated by the same rule. Stated differently, that the government may unjustly deprive itself of monetary benefits under Part B is one thing; that it will deprive Operators in the same way under Part C is entirely another. The use of § 410.490 to determine the liabilities of

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[16]In this context, it is of little concern that courts are excluded from the APA. 5 U.S.C. § 551(1)(B). As appellate courts have no authority to prescribe administrative rules, the exclusion cannot confer power outside the APA framework which the court did not possess within that framework.

regulated-industry is wholly foreign to the design and intent of the rule.

(a) Due Process Violations

Procedural due process requires the opportunity to be heard at a meaningful time and in a meaningful way. *Armstrong v. Manzo,* 380 U.S. 545, 552, (1965). It must offer parties the opportunity to present their case and have its merits fairly judged. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433 (1982). These fundamental opportunities are denied Operators under § 410.490 for the rule obviates all defenses except that (1) the miner is performing his usual employment; or (2) the miner is capable of performing his usual coal mine work. 20 C.F.R. § 410.490(c). This deprives litigants of a "meaningful opportunity" to contest the existence of pneumoconiosis and whether the miner's disability is related to employment.[17] *Accord, Cook v. Director, Office of Worker's Comp. Programs,* 816 F.2d 1182, 1184, (7th Cir., 1987) (no § 410.490 rebuttal by medical evidence). Thus, even where an Operator can disprove one of the three conditions of entitlement,[18] § 410.490 would still compel benefits. *Contra, Mullins Coal Co. of Virginia v. Director, Office of Workers' Compensation Programs,* No. 86-327 (Sup.Ct., filed December 14, 1987). The inadmissability of causation evidence also raises the constitutional question of whether the § 410.490 presumption offers a rational connection between what is proven and what is presumed as a result. There is no constitutional

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[17]Limiting evidence that Operators may introduce would also contravene the full and fair hearing requirement of the APA. 5 U.S.C. § 556(d).

[18]These three conditions of entitlement are embodied in 30 U.S.C. § 901 and include (1) total disability; (2) due to pneumoconiosis; (3) arising out of coal mine employment.

predicate for presuming causation where evidence tending to disprove it is inadmissible. *Mullins, supra.* at ____ n.32.

(b) Equal Protection Violation

The equal protection component of the due process clause of the Fifth Amendment to the United States Constitution imposes upon the federal government the same equal protection standards applicable to the states under the Fourteenth Amendment. *Schweiker v. Wilson,* 450 U.S. 221, 226 (1981); *Weinberger v. Salfi,* 422 U.S. 749, 768-70 (1975). In cases of social welfare legislation, equal protection requires that discriminatory treatment be rationally related to a legitimate governmental objective. *United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 175 (1980). In the case of § 410.490, the regulation accepts evidence when proffered by miners, but precludes the same type of evidence when offered by Operators or insurance carriers, thus discriminating against Operators and carriers. For example, § 410.490(b)(l)(i) requires X-ray evidence before claimants can invoke the interim presumption of disability. Similarly, § 410.490(b)(2) contemplates medical opinion-evidence by the claimant to establish the casual relationship of disability to his former employment.[19] Conversely, the rebuttal provisions governing defense of these claims make no allowance for Operators to submit either X-ray evidence or medical opinion contesting causation. 20 C.F.R. § 410.490(c). This arbitrary rejection of Operator evidence is unrelated to any governmental objective. Indeed, it is contrary to the Congressional purpose of benefiting only miners disabled due to pneumoconiosis. 30 U.S.C. § 901(a). The regulation cannot condition the

[19]Section 410.490(b)(2) does not specifically mention medical opinion, referring only to proof of casual relationship. However, there is no means to establish casual relationship apart from medical opinion.

admissibility or relevancy of evidence upon the identity of its sponsor and conform to the requirements of equal protection as defined by this Court.

(c) Inconsistency with Enabling Legislation

Regulations must be consistent with the statute under which they are promulgated. *United States v. Larionoff,* 431 U.S. 864, 873 (1977). Section § 410.490 cannot meet this basic standard as is vividly illustrated by comparing the regulation with related provisions of the Act. The Act provides that miners possessing 10 or more years of coal mine employment will be entitled to a "rebuttable" presumption their pneumoconiosis arose out of coal mine employment. 30 U.S.C. § 921(c)(3). This language clearly implies an avenue of rebuttal. While § 410.490 affords an equivalent presumption upon proof of 10 years of coal mine employment, 20 C.F.R. § 410.490(b)(2), it does not allow for rebuttal of this presumption by any means. The regulatory presumption thus conflicts with the statutory presumption. In similar fashion, § 410.490(c) does not allow Operator contests on the issue of causation. Whereas, the Act specifically states that no Operator shall pay benefits for disability which did not arise, in whole or in part, out of employment. 30 U.S.C. § 932(c). The regulation is out of harmony with the statute and, therefore, invalid.

CONCLUSION

The petition for writ of certiorari should be granted either independent of or in conjunction with the petition of the Solicitor General in *Kyle v. Director, Office of Workers' Compensation Programs,* 819 F.2d 139 (6th Cir., 1987) and *Broyles v. Director, Office of Workers' Compensation Programs,* 824 F.2d 327 (4th Cir., 1987).

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